BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL PAUL WIEHE Claimant	)	
VS.	)	
KISSICK CONSTRUCTION Respondent	)	Docket No. 1,026,227
AND	)	
BUILDERS ASSOCIATION SELF INSURANCE FUND Insurance Carrier	)	

ORDER

Claimant requests review of the January 5, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

It was undisputed that claimant was injured at work when the sheeps foot roller tipped over, ejecting him from the cab. The respondent defended the claim for compensation alleging that the claimant's use of marijuana and methamphetamine contributed to the injury.

Following an extensive preliminary hearing during which the parties stipulated to the admissibility of post-injury drug testing which was performed upon claimant at the hospital, the ALJ denied claimant's claim, explaining that "[t]he respondent proved by a preponderance of the evidence that the claimant was impaired by drugs at the time of the accident, and that the claimant's use of drugs contributed to the injury."[1]

The claimant requests review of this determination. Claimant contends the ALJ improperly assumed claimant's accident was caused by his drug use, thus placing the burden of proof inappropriately on claimant rather than on respondent to establish the causal link, or lack thereof, between the accident and the claimant's impairment. Claimant contends there are other alternative reasons for the accident. According to claimant, on

[1] ALJ Order (Jan. 5, 2006) at 2.

the day of the accident he was merely trying to work as efficiently as possible, grooming the area to be asphalted and that his quick work, coupled with what he believed to be an unstable machine and an unexpectedly large piece of clay led to his accidental injuries. For this reason, claimant maintains the ALJ's preliminary hearing Order should be reversed and an order for compensation or a remand for further proceedings are justified.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ's preliminary hearing Order fully set forth the facts and circumstances surrounding this claim. They need not be repeated and Board adopts them as its own. Suffice it to say, claimant was injured in an otherwise compensable accident on September 21, 2005 when the sheeps foot roller he was operating tipped over. Claimant was seriously injured and is in need of further medical treatment for those injuries.

Following his accident a drug test was administered and based upon the parties stipulation, the results of that test are fully admissible in this preliminary hearing proceeding. They reveal claimant had a marijuana metabolite level of 62 nanograms per milliliter, a concentration that, by statute, compels a finding that claimant was conclusively impaired.[2] The uncontroverted evidence also establishes that claimant used methamphetamine on the late afternoon or evening before his accident, taking two "hits" before leaving his workplace.

The greater weight of the evidence bearing upon claimant's conduct on the day of the accident strongly suggests that he was acting normally. While two individuals (Mike Eddings and Jack Staton) suggested he was acting strangely, those individuals either lacked credibility or their testimony was outweighed by that of Brad Lawson, who was very close in proximity to claimant at the time of the accident and even watched the accident happen. According to Mr. Lawson, there was nothing that he observed about claimant on that morning that led him to think the claimant was impaired by drugs.

The entirety of the dispute, as presently framed, stems from this single question: did claimant's conclusive impairment contribute to his accident? The ALJ concluded that "[t]here is no way to dismiss the claimant's drug use as a contributing factor in this case."[3] Thus, the affirmative defense was found to be applicable and claimant was denied any benefits.

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[2] K.S.A. 44-501(d)(2) (2005 Session Laws, House Bill No. 2141).

[3] ALJ Order (Jan. 5, 2006) at 2.

The issue regarding whether drug consumption contributed to an injury, disability or death, thus allowing denial of liability under K.S.A. 44-501(d)(2) is a certain defense under K.S.A. 44-534a and subject to review by the Board from a preliminary hearing order.

While it is the claimant's burden to establish his right to an award of compensation by proving all of the various conditions on which the claimant's right depends by a preponderance of the credible evidence, it is the respondent's burden to establish an affirmative defense such as a contribution due to impairment from drugs.

In this instance, the ALJ concluded there was no way to divorce the claimant's drug use from the fact that an accident occurred. This presumption was clear from the transcript of the preliminary hearing. At the close of the testimony and after some discussion about the parties' stipulation as to the admissibility of the drug test results, the ALJ turned his attention to this issue and the following exchange occurred:

> **Mr. McCurdy**: With that level he's presumptively impaired, but you still have to make the additional finding. Then the issue becomes whether the impairment caused or contributed to the accident.
>
> **Judge Hursh**: Why didn't it?[4]

Even respondent acknowledged that this causal link needed to be satisfied in order for the defense to be found viable. In fact, respondent had intended to offer expert testimony on the issue of the physiological effects of marijuana on the body. But due to the press of time, that witness never testified. Respondent's counsel asked to have the record left open, but the ALJ never ruled on that issue. Nothing more in the way of evidence was offered beyond that date.

That being the case, the only evidence available and relevant to the issue of whether claimant's impairment contributed to his injury is that offered by the claimant and the other witnesses that testified at the preliminary hearing. What can be gleaned from the record is that while *statutorily impaired* at the time of his accident, no one who was face to face or worked with claimant that day concluded he was impaired or was incapable of operating the machinery he was assigned to.

Claimant maintains the machine he was using was "tipsy" or unstable.[5] He had, however, used this sort of machine numerous times before without incident. Claimant had been told to keep his machine "moving" and based upon that directive, thought it was acceptable to press ahead and back over the large piece of dirt that caused his machine to tip over. Claimant also maintains the spreader that would typically have spread this dirt around was not made available and claimant did not want to waste time waiting on it.

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[4] P.H. Trans. at 151.

[5] *Id.*, Ex. E (Wiehe [claimant) Depo. at 15).

There is some evidence that Brad Lawson, the man who was watching claimant compact this area, anticipated this accident. Mr. Lawson testified that the first time claimant tried to back over the dirt he believed the machine was going to tip. It was not claimant's job to spread the dirt, only to compact it. And normally even if one were trying to spread out dirt such as this, the typical method to use would be to attack the area from the front of the sheeps foot machine, where the blade and the weight are located rather than from the rear of the machine.

Mr. Lawson further testified that as claimant stopped, he pulled forward and adjusted the angle of approach and attempted the maneuver again. As he did so, Mr. Lawson says he shook his head at claimant. Claimant denies seeing this. Mr. Lawson said he locked eyes with claimant and as the cab tipped, he watched claimant jump and fall to the ground.

Essentially, what the Board must decide is if claimant's accident occurred because of impaired judgment or simply bad judgment. K.S.A. 44-501(d)(2) provides that an employer "shall not be liable under the workers compensation act *where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs..."*[6] In spite of recent amendments to this statute, the contribution requirement - the link between the employee's impairment and the accident - has remained the same.

The ALJ seemed to believe that the presumption of impairment conclusively led to a presumption that the accident was caused by claimant's impairment, because the two elements could not, in his mind, be separated. In other words, one could not exist without the other. Put another way, if claimant was impaired, his impaired status must have caused the accident.

The Board finds that the statute's own language disputes this contention. Independent of a conclusive finding of impairment, nonetheless there must be evidence of contribution between the impairment and the accident. And it is respondent's burden to meet.

After reviewing the record as a whole, the undersigned Board Member is not persuaded that the evidence establishes that it is more likely than not that claimant's conclusive impairment contributed to cause his accident. This record, as it now stands, fails to explain how this level of marijuana affects an individual such as claimant and his ability to operate this sort of machinery. This sort of equipment is not like a car and therefore the factfinder cannot rely upon his or her own experiences in determining whether claimant's conduct was merely reckless or the result of impaired judgment caused by his marijuana use. The witness who was closest in proximity to claimant, Brad Lawson, failed to observe any abnormal behavior and although claimant's attempt at backing over this dirt may have been unusual, there is no evidence that this conduct is prohibited or that claimant or others had ever done work when impaired. Mike Eddings claims claimant was

[6] K.S.A. 44-501(d)(2) (2005 Session Laws, House Bill No. 2141)(emphasis added).

acting "squirrely" but he saw claimant for all of 10 seconds at most and from a moving vehicle. And his observations were not revealed until a week after the accident. Jack Staton tried to say claimant appeared to be on drugs, but like the ALJ, the Board finds him to lack credibility as his testimony was shown to be false in at least one instance. Claimant testified that his drug use from the day before did not cause or contribute to the events of September 21, 2005. He testified that he was "clear headed".[7] The application of the drug defense, and its presumption of impairment defy this contention. But without evidence to explain the effect of the drug(s) on the claimant, evidence which the respondent apparently brought to the hearing but for whatever reason, failed to present either in person or by deposition, the Board is not persuaded that the causation element has been satisfied.[8]

Obviously, the statute, K.S.A. 44-501(d)(2) was clearly intended to address employers' concerns over impaired employees and their workplace injuries. In fact, the ALJ recognized the Legislature's recent attempt to liberalize the application of the defense, no doubt in the hopes of making the defense more available to respondents. Nonetheless, the statute, *as written,* requires certain elements to be established. The parties stipulated to the admissibility of the test results, but chose to litigate the link between claimant's accident and his conclusive impairment status. Based upon the evidence included within this record, this necessary element has not been met. Thus, the ALJ's preliminary hearing Order is reversed.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated January 5, 2006, is reversed.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

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BOARD MEMBER

c: Christopher J. McCurdy, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[7] *Id.* at 28.

[8] Respondent is free to follow the appropriate procedure and request another preliminary hearing on this issue and present the evidence which was not originally proffered. That evidence may or may not explain the impairment that results from marijuana and its contribution to the claimant's accident. If so, another determination will have to be made based upon all the evidence then present before the factfinder.